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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 202

HARRY FLEISHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 203

SAM FLEISHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 204

JOSEPH STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 35–37) is reported in 91 F. (2d) 404.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 3, 1937. (R. 34.) The petition for writs of certiorari was filed July 8, 1937, and granted October 11, 1937. (R. 38–39.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The question presented, as limited by this Court in granting the petition for writs of certiorari, is whether the first count of the indictment states an offense under Federal law.

STATUTE INVOLVED

Section 37 of the Criminal Code, 35 Stat. 1096 (U. S. C., Title 18, Sec. 88), follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

STATEMENT

Petitioners were indicted, with others, in the District Court of the United States for the Eastern

District of Michigan on four counts of an indictment charging conspiracies to violate various provisions of the internal revenue laws. The first count, the one here involved, charged that the defendants—

> did, in the Eastern District of Michigan, Southern Division, from, to-wit, the 1st day of October, A. D. 1934, to and including the time of the filing of this indictment, unlawfully, feloniously, knowingly and willfully conspire, combine, confederate, arrange and agree together and each with the other to commit at the times aforesaid at, to wit: 5620 Federal Street, in the City of Detroit, in the County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court, an offense against the laws of the United States, that is to say, that the said aforementioned defendants and co-conspirators would, during the aforementioned time and at the aforementioned place, unlawfully, knowingly, willfully and feloniously possess and cause to be possessed, keep in custody, control and cause to be controlled certain stills and distilling apparatus for the production of distilled spirits, and would set up and cause to be set up the said aforementioned stills and distilling apparatus without having the same registered with the Collector of Internal Revenue as required by law; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Certain overt acts were set forth. (R. 1–2.)

Petitioners were convicted on all four counts of the indictment (R. 8) and each was sentenced to two years' imprisonment and to pay a fine of $5,000 on each count, the imprisonment sentences to run consecutively and the fines to be cumulative (R. 9–12). Upon separate appeals to the Circuit Court of Appeals for the Sixth Circuit (R. 12–23) the convictions and sentences were affirmed (R. 34–37). Petitioners thereupon applied to this Court for writs of certiorari and, on October 11, 1937, the petition was granted, limited to the question whether the first count of the indictment states an offense under Federal law (R. 38–39).

SUMMARY OF ARGUMENT

The first count of the indictment charged as the object of the conspiracy the possession of certain stills, etc., without having the same registered with the Collector of Internal Revenue as required by law. Applicable laws and regulations required that stills be registered with the District Supervisor of the Alcohol Tax Unit, in the Bureau of Internal Revenue.

Indictments charging the possession of stills without having the same registered with the Collector of Internal Revenue have been held to charge no offense. While not free from doubt, in our opinion the object of the conspiracy as set forth in the first count does not describe an offense

against the laws of the United States, and the charge must therefore fail.

There is the possibility of treating the words "Collector of Internal Revenue" as surplusage. We believe, however, that the phrase is a material allegation or at least descriptive matter which cannot be so rejected.

There is also the possibility of applying the doctrine of aider by verdict, but we have concluded that the count in question is not one involving merely a defective statement of an offense, which would be aided by verdict, but an entire failure to charge a crime.

ARGUMENT

The question as to whether the first count of the indictment stated an offense was not raised in the courts below or in the petitioners' application for writs of certiorari. In view, however, of petitioners' conviction on that count and the separate sentences of two years' imprisonment and $5,000 fine imposed thereunder, the Government deemed it to be its duty to point out to this Court in its brief in reply to the petition for writs of certiorari that the count charged as the object of the conspiracy the possession, etc., of certain stills, etc., "without having the same registered with the Collector of Internal Revenue as required by law," and that several Circuit Courts of Appeals have held that an indictment charging a failure to register stills with the Collector of Internal Revenue states no offense.

The count in question was obviously drawn under Section 3258, Revised Statutes (U. S. C., Title 26, Sec. 1162), which provides:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.
>
> Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.
>
> And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

1. However, it seems clear to us that the requirement of R. S., Sec. 3258 to register stills with the Collector of Internal Revenue is no longer applicable to the registration of stills. The legislation and executive action taken with respect to this subject are rather complicated, so we will set forth the successive steps in considerable detail.

Up to April, 1927, stills were registerable with the Collector of Internal Revenue. But on March 3, 1927, Congress passed the Reorganization Act (c. 348, 44 Stat. 1381) creating in the Treasury Department a Bureau of Prohibition, with a Commissioner of Prohibition at the head thereof. One of the duties theretofore imposed on the Commissioner of Internal Revenue and his assistant, the collector, was to receive the registration of stills. This duty Congress by Section 4 (a) of the above Act transferred to the Secretary of the Treasury.[1] The Act of 1927, *supra*, however, further provided (Sec. 4 (b)) that the Secretary of the Treasury could confer on the Commissioner of Prohibition, or any of the officers or employees of the Bureau of

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[1] "The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by the National Prohibition Act, as amended, or any other law relating to the enforcement of the eighteenth amendment, are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury."

Prohibition, the powers and duties imposed on him by the Act.[2] This the Secretary did, on April 1, 1927, by issuing Bureau of Prohibition Treasury Decision No. 1.[3] Among other duties imposed on the Commissioner of Prohibition were those set forth in Article IV, paragraph 2, subdivisions (a) and (b), reading as follows:

> (2) There are also hereby conferred and imposed upon the Commissioner of Prohibition, subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a) of section 4 of the above act of March 3, 1927) by any law, in so far as such rights, privileges, powers, and duties relate to—

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[2] "The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes."

[3] See appendix (p. 213 *et seq.*) to Bureau of Industrial Alcohol Regulations No. 2, effective April 1, 1931, relating to permits, etc., prescribed jointly by the Secretary of the Treasury and the Attorney General under the Prohibition Reorganization Act of 1930.

(a) The production, custody, and supervision of distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids.

(b) The establishment, construction, operation, custody, and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored.

Paragraph 3 of the above article authorized the Commissioner of Prohibition to prescribe regulations with the approval of the Secretary of the Treasury. Shortly after the passage of the Reorganization Act of 1927, *supra*, District Prohibition Administrators were appointed in the Bureau of Prohibition and the duty of receiving registrations of stills was imposed upon them. This was confirmed by Article 18 of Regulations No. 3, Bureau of Prohibition, relating to industrial alcohol, etc., revised August, 1927, and effective October 1, 1927, reading, in part, as follows:

Proprietors of industrial-alcohol plants, distillers, and all others who set up stills, except retorts for production of wood alcohol and glass laboratory stills of small capacity, must register them in quadruplicate on Form 26 with the *administrator of the district* in which set up, except where such

> stills have heretofore been registered and no change in ownership or location has occurred since such registry. * * *. [Italics supplied.]

Thereafter, Congress passed the Prohibition Reorganization Act of May 27, 1930 (c. 342, 46 Stat. 427), which created in the Department of Justice a Bureau of Prohibition and transferred to it certain enforcement work theretofore performed by the Bureau of Prohibition in the Treasury Department with respect to the National Prohibition Act and the internal revenue laws where a violation of the National Prohibition Act was involved. The administration of the laws relating to the legal production and distribution of liquor under the internal revenue laws and Title III of the National Prohibition Act, including the registration of stills, remained, however, in the Treasury Department. Section 5 of the Act provided for the issuance of certain joint regulations by the Secretary of the Treasury and the Attorney General and declared that regulations issued prior to the effective date of the Act should no longer be in force. The Act also changed the name of the Bureau of Prohibition to the Bureau of Industrial Alcohol, Section 8 providing:

> The Bureau of Prohibition in the Treasury Department shall hereafter be known as the Bureau of Industrial Alcohol, and the Commissioner of Prohibition in the Treasury Department shall hereafter have the title of Commissioner of Industrial Alcohol.

Pursuant to this legislation the Secretary of the Treasury, on July 1, 1930, approved Bureau of Industrial Alcohol Regulation No. 1 which established in the Bureau of Industrial Alcohol twelve permissive districts, in lieu of the administrative districts theretofore existing, and provided for the appointment in each district of a supervisor of permits, who should perform such duties as might be provided by regulations.[4] On June 30, 1930, Bureau of Prohibition Treasury Decision No. 54 was issued, providing as follows:

> Effective 12:01 a. m., July 1, 1930, all rights, powers, privileges, and duties of prohibition administrators and assistant prohibition administrators of the Bureau of Prohibition in the Treasury Department, within their respective administrative districts, are transferred to and conferred and imposed upon Supervisors of Permits and Assistant Supervisors of Permits, respec-

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[4] "There are hereby established in the Bureau of Industrial Alcohol 12 permissive districts, in lieu of the administrative districts heretofore existing. The Commissioner of Industrial Alcohol, with the approval of the Secretary of the Treasury, shall appoint for each permissive district a supervisor of permits, who shall perform such duties, under the supervision of the commissioner, as may be provided by regulations. The commissioner may, with the approval of the Secretary, appoint for any district one or more assistant supervisors, who shall assist the supervisor in the performance of his duties. An assistant supervisor may be designated by the commissioner to act as supervisor during the absence or disability of the supervisor, or in the event that there is no supervisor for the district. * * *"

> tively, within their respective Permissive Districts, except as otherwise provided by law or regulations promulgated thereunder.

The change with respect to the registration of stills from the prohibition administrator to the supervisor of permits was provided for in Regulations No. 3, Bureau of Industrial Alcohol, Treasury Department, approved jointly by the Secretary of the Treasury and the Attorney General on March 24, 1931, to be effective as of April 1, 1931. Article 14 of these regulations provided:

> Every person, including the proprietor of an industrial-alcohol plant, having in his possession or custody, or under his control, any still or distilling apparatus set up, except retorts for the production of wood alcohol and glass laboratory stills of small capacity, shall register the same in quadruplicate on Form 26 with the *supervisor of the district* in which set up, except where such stills have heretofore been registered and no change in ownership, possession, custody, control, or location has occurred since such registry. * * * [Italics supplied.]

On March 3, 1933, Congress passed the Act (c. 212, 47 Stat. 1489) empowering the President to regroup Government agencies, and by Executive Order No. 6639, promulgated March 10, 1934 (U. S. C., Title 5, Sec. 132, note), he directed that the Bureau of Industrial Alcohol and the office of Commissioner of Industrial Alcohol be abolished

and the rights and powers imposed on the Commissioner of Industrial Alcohol transferred to the Commissioner of Internal Revenue. Authority was also given the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe regulations.[5]

On May 10, 1934, the effective date of Executive Order No. 6639, Treasury Decision No. 4432 was approved by the Secretary of the Treasury.[6] This

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[5] "The Bureau of Industrial Alcohol and the office of Commissioner of Industrial Alcohol are abolished, and the authority, rights, privileges, powers, and duties conferred and imposed by law upon the Commissioner of Industrial Alcohol are transferred to and shall be held, exercised, and performed by the Commissioner of Internal Revenue, and his assistants, agents, and inspectors, under the direction of the Secretary of the Treasury. * * *"

[6] "1. There is hereby established in the Bureau of Internal Revenue a unit to be known as the Alcohol Tax Unit, at the head of which shall be a Deputy Commissioner of Internal Revenue appointed as required by law.

2. "The Alcohol Tax Unit shall be charged with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws concerning the following subjects:

"(a) The production, custody, and supervision of distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids;

"(b) The establishment, construction, operation, custody, and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored;

* * * * *

"3. There are conferred and imposed upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol

Decision established in the Bureau of Internal Revenue a unit to be known as the Alcohol Tax Unit, headed by a Deputy Commissioner of Internal Revenue. Paragraph 2 of the Decision charged the Alcohol Tax Unit with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws respecting the subjects enumerated in subdivisions (a) to (g), inclusive, of paragraph 2. Paragraph

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Tax Unit, and the assistants, inspectors, and agents under his supervision, subject to the direction of the Commissioner of Internal Revenue and subject to such regulations as he may prescribe from time to time with the approval of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred and imposed upon the Secretary of the Treasury and/or the Commissioner of Internal Revenue under the provisions of the Executive Order of March 10, 1934 (No. 6639), and of section 4 (a) of the Act approved March 3, 1927, entitled "An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury", in so far as they relate to the duties to be performed by the Alcohol Tax Unit as enumerated in paragraph 2 hereof.

"4. Except as may hereafter be otherwise provided, all regulations prescribed, all orders and instructions issued, and all forms adopted for the enforcement of the laws heretofore administered by the Commissioner of Industrial Alcohol or the Bureau of Industrial Alcohol, and assistants, inspectors, and agents thereunder, and remaining in effect after the repeal of the Eighteenth Amendment, will continue in effect as regulations, orders, instructions, and forms of the Bureau of Internal Revenue: *Provided*, That the term 'Commissioner' or 'Commissioner of Industrial Alcohol' and the term 'Supervisor' or 'Supervisor of Permits', wherever used in such regulations, orders, instructions, and forms, shall be held to mean, respectively, 'Deputy Commissioner of Internal Revenue' and 'District Supervisor.'"

3 of the Decision conferred upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit and the assistants, investigators and agents under his supervision, subject to the direction of the Commissioner of Internal Revenue and subject to such regulations as he might from time to time prescribe with the approval of the Secretary of the Treasury, all the rights, privileges, powers and duties conferred and imposed upon the Secretary of the Treasury or the Commissioner of Internal Revenue under the provisions of Executive Order No. 6639 and Section 4 (a) of the Reorganization Act of March 3, 1927, *supra*. Paragraph 4 adopted all regulations prescribed for the enforcement of the laws theretofore administered by the Commissioner of Industrial Alcohol, or the Bureau of Industrial Alcohol, and continued them in effect as regulations of the Bureau of Internal Revenue, providing that the term "Supervisor" or "Supervisor of Permits" wherever used in such regulations should mean "District Supervisor." Under this Treasury Decision the District Supervisor of the Alcohol Tax Unit succeeded to the duties of the Supervisor of Permits in the Bureau of Industrial Alcohol and after the promulgation of this Decision on May 10, 1934, stills were required to be registered with the District Supervisor of the Alcohol Tax Unit.

That the Treasury officials had power to change the registration of stills from the Collector of In-

ternal Revenue to the District Supervisor of the Alcohol Tax Unit amply appears, we think, from the foregoing Reorganization Acts and the Executive Order.[7] If Congress could provide for the registration of stills with the Collector of Internal Revenue in the first place, it could change this duty and confer it on any other official. This it did in the several Reorganization Acts, at the same time giving the Secretary of the Treasury power to confer the duty on any of his subordinates. That the Secretary of the Treasury and the Commissioner of Internal Revenue, pursuant to this authority, properly delegated the duty of receiving the registration of stills to the District Supervisor of the Alcohol Tax Unit, clearly appears, we submit, from the foregoing Treasury Decisions and regulations. While the still possessor was not specifically mentioned, Congress gave the Secretary of the Treasury a mandate to modify the existing system with respect to the duties of his Department and personnel. It obviously intended that if and when the Secretary of the Treasury modified the system

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[7] This question of power is referred to because of the contention made in the cases of *Frank E. Whitcombe et al.* v. *United States*, Nos. 258–261, now pending before this Court on a petition for writs of certiorari, that there was no power conferred on the Secretary of the Treasury or the Commissioner of Internal Revenue to change by regulations the duty imposed on a citizen by Section 3258 R. S. to register a still with the Collector of Internal Revenue and require him to register with the District Supervisor of the Alcohol Tax Unit.

and transferred the duties of the Treasury officials and subordinates such transfer should affect all concerned to the extent necessary to accomplish the transfer.

It will therefore be seen from the foregoing that on the date of the alleged offense, to-wit, October 1, 1934, to and including the time of the filing of the indictment on October 30, 1935 (R. 1), the petitioners were required to register their stills with the District Supervisor of the Alcohol Tax Unit, and not with the Collector of Internal Revenue as charged in count one of the indictment.

2. The situation, then, is one in which the defendants were indicted for a conspiracy to possess stills without their registration with the Collector of Internal Revenue. But Section 37 of the Criminal Code, *supra,* punishes only conspiracies to commit an offense against the United States and it was not an offense to possess a still which had not been registered with the Collector of Internal Revenue. Accordingly, we are of the opinion that the first count of the indictment charged no offense.

The decisions of the Circuit Courts of Appeals which have considered indictments charging a failure to register a still with the Collector of Internal Revenue, as required by law, have held that such indictments charge no offense. In *Benton* v. *United States,* 80 F. (2d) 162, certiorari denied, 297 U. S. 705, the first count of an indictment drawn under this section charged the defendants

with the possession of a still without having registered the same with the Collector of Internal Revenue, as required by law. The defendant contended that at the time of the alleged offense, to-wit, on April 23, 1934, it was no longer incumbent upon a person having a still in his possession to register it with the Collector of Internal Revenue, as required by Section 3258, Revised Statutes, and that therefore the count stated no offense. In upholding this contention, the Circuit Court of Appeals for the Fourth Circuit said (pp. 163–164):

> We are of the opinion that this point was well taken. That section was re-enacted by the act of November 23, 1921, 42 Stat. 222 (page 223, section 5 [27 U. S. C. A. sec. 3], supplemental to the National Prohibition Act, *United States* v. *Stafoff*, 260 U. S. 477; but it has been modified by subsequent legislation with the result that between April 1, 1927, and July 1, 1930, stills were registerable with the District Prohibition Administrators, and between July 1, 1930, and May 10, 1934, with the District Supervisor of Permits in the Bureau of Industrial Alcohol, and since May 10, 1934, with the District Supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue. It follows, that on the date charged in the first count of the indictment in the pending case, a distiller was not required to register with the collector of internal revenue as charged, and that count must fall, since it stated no offense.

In *Scott* v. *United States*, 78 F. (2d) 791, the indictment charged a failure to register a still with the Collector of Internal Revenue, as required by law. After reviewing the statutes on the subject passed subsequent to Section 3258, Revised Statutes, and the regulations promulgated thereunder, the Circuit Court of Appeals for the Tenth Circuit said (p. 793):

> The indictment charged a failure to register the still with the Collector of Internal Revenue. The statutes and regulations thereunder in force on July 31, 1934, required registration with the supervisor of the district in which the still was set up.
> * * *
>
> We conclude the indictment failed to charge facts sufficient to constitute an offense against the United States.

To the same effect are the decisions of the Circuit Courts of Appeals for the Second and Ninth Circuits, in *United States* v. *Lecato*, 29 F. (2d) 694 (C. C. A. 2d); *Silva* v. *United States*, 35 F. (2d) 598 (C. C. A. 9th), certiorari denied, 281 U. S. 751, and *Connley* v. *United States*, 46 F. (2d) 53 (C. C. A. 9th), where indictments charged the failure to register stills with the Collector of Internal Revenue instead of charging failure to register with the District Prohibition Administrator of the Bureau of Internal Revenue as required by law and regulations in effect during a portion of the prohibition era. See also *United States* v.

Dibella, 28 F. (2d) 805 (C. C. A. 2d), certiorari denied, 278 U. S. 658. Cf. *Stork Restaurant Corp.* v. *McCampbell,* 55 F. (2d) 687, 690 (D. C. S. D. N. Y.).

3. It might be argued that the count in question is one for conspiracy; that the conspiracy is the gist of the offense, separate and distinct from the offense which is the object of the conspiracy; that the object of the conspiracy need not be pleaded with the detail and particularity required in charging the substantive offense (*Thornton* v. *United States,* 271 U. S. 414, 423); and that therefore the charge was sufficient. However, the conspiracy statute (U. S. C., Title 18, Sec. 88) makes it a crime only if two or more persons conspire *to commit an offense against the United States,* or to defraud the United States, providing one or more of the parties do an act to effect the object of the conspiracy. The charge here is a conspiracy to commit "an offense against the laws of the United States." Unless the object of the conspiracy is an offense against the laws of the United States the charge must fail. *United States* v. *Britton,* 108 U. S. 199. While liberality is permitted in pleading the object of the conspiracy, the offense which the defendants conspired to commit must be identified. In *Williamson* v. *United States,* 207 U. S. 425, 447, it was said that "in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the

offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." *Clark,* Criminal Procedure, 2d ed. p. 178, says: "A pleading is certain to a common intent when it is clear enough according to reasonable intendment or construction, though not worded with absolute precision." Since, then, the defendants were required by law to register their stills with the District Supervisor of the Alcohol Tax Unit, the question is whether the object of the conspiracy, which is stated to be the possession etc., of certain stills etc., without having the same registered with the Collector of Internal Revenue as required by law, is set out in a manner to come within the scope of the above quoted rule. As bearing on the identification of the offense, it may be significant that the question was not raised at any time by the defendants.

If the count had failed to name the officer with whom the stills were to be registered, and merely charged a failure to register as required by law and regulations, the charge would probably have been sufficient to bring it within the present law. It was, in effect, so held by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Lecato, supra,* p. 694. The phrase "as required by law and regulations" would undoubtedly have carried with it the connotation that the still was not registered with the officer authorized to accept registrations. The name of the officer, if deemed

necessary to the defendants' defense, could have been supplied by a bill of particulars. So, too, this might have been the result had the charge been a failure to register with the Collector or any other person, as required by law. But the question remains, having set out the object of the conspiracy with unnecessary particularity might the court have rightfully held the words "with the Collector of Internal Revenue", to be mere surplusage, so as to make the charge applicable to the present law and regulations? This inquiry must be measured against the rule that no allegation can be rejected as surplusage whether it be necessary or unnecessary, or more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment. *United States* v. *Weiss,* 293 Fed. 992, 995 (D. C. N. D. Ill.). See also Justice Story's opinion in *United States* v. *Howard,* 26 Fed. Cas. 388, No. 15403. We incline to the view that the phrase "with the Collector of Internal Revenue", is material matter and may not therefore be rejected as surplusage. It specifies and makes certain the alleged crime and cannot be brushed aside as immaterial.

It seems to be immaterial that an indictment may have been based upon a particular statute which has been repealed or under which the charge otherwise cannot be sustained. If the facts pleaded bring it within some existing statute, it will be

upheld and treated as having been filed under such statute. Allegations not essential to a charge under the latter statute will be treated as surplusage. *Maresca* v. *United States,* 277 Fed. 727, 741–742 (C. C. A. 2d), certiorari denied, 257 U. S. 657; *Farley* v. *United States,* 269 Fed. 721, 724 (C. C. A. 9th); Cf. *Williams* v. *United States,* 168 U. S. 382, 389; *United States* v. *Nixon,* 235 U. S. 231, 235. In the *Farley* case the defendant was indicted under Section 3242, Revised Statutes, for unlawfully carrying on the business of a retail liquor dealer without having paid the special tax as required by law. The court held that Section 3242 had been impliedly repealed by the National Prohibition Act but that the indictment sufficiently charged a sale of liquor in violation of the National Prohibition Act and it was therefore sustained. The allegation with respect to the omission to pay the special tax was treated as surplusage. In the *Maresca* case, *supra,* the third count of the indictment charged the defendants with unlawfully selling, on November 15, 1919, for beverage purposes, a quantity of distilled spirits manufactured from foods, fruits and feeds after September 9, 1917, contrary to the Lever Act. The court held that at the time of the alleged offense the Lever Act was not in existence, having been superseded by the War Prohibition Act, but it sustained the count under the latter Act. The allegation that the spirits were manufactured from certain food materials after September 9, 1917, was regarded as

surplusage, it being immaterial under the War Prohibition Act when the spirits were distilled.

To bring the present count within existing law and regulations, under the ruling of the above cases, the phrase, "with the Collector of Internal Revenue," would have to be rejected as surplusage. But this, it would seem, could not be done because it is a material part of the charge. It not only affirmatively specifies the person with whom the stills were supposed to be registered but in effect negatives that they were registerable with some one else. The law required them to be registered elsewhere. If the phrase, "with the Collector of Internal Revenue," be rejected as surplusage, it would seem that the modifying phrase, "as required by law," would also have to be rejected, thus leaving the charge without a criminal offense as the object of the conspiracy. The phrase, "as required by law," we think, modifies the words, "with the Collector of Internal Revenue," and not the preceding phrase, "without having the same registered." In *Scott* v. *United States, supra,* p. 793, the Circuit Court of Appeals for the Tenth Circuit held that the general language, "as required by law," in the indictment in that case was controlled by the specific language which preceded it. We are of the opinion that the phrase, "as required by law," was a conclusion of the pleader

which was not justified by the facts pleaded with respect to the failure to register with the Collector.

In *United States* v. *Lecato, supra,* the Government contended that naming the wrong person with whom the still was required to be registered is like misnaming the statute under which the crime is laid; "but," said the court (p. 694), "the trouble goes deeper, because the indictment lays no crime at all, unless it would have been good without any allegation whatever as to registration."

The *Scott* and *Lecato* cases, *supra,* involved the question of violation of Title 26 U. S. C. § 1162, while here the question is not one of violation of that section but of a conspiracy to violate it. Recognizing this distinction, still they establish that the object of the conspiracy as set out is not criminal. And an indictment for conspiracy is bad if it does not set forth the object specifically and show that it is criminal. *United States* v. *Cruikshank,* 92 U. S. 542.

4. We believe the Court also should note the possible application of the doctrine of aider by verdict. Defects in pleading are aided by intendment; that is, the court will after verdict, presume or intend that the particular thing which is imperfectly stated was duly proved at the trial, when it was within the issue made by the pleadings, and must have been proved to authorize the verdict. The court in the *Scott* case, *supra,* seemed to rec-

ognize the possibility of the application of this doctrine when it said at p. 793:

> The indictment charged a failure to register the still with the Collector of Internal Revenue. The statutes and regulations thereunder in force on July 31, 1934, required registration with the supervisor of the district in which the still was set up. The general language in the indictment "and as required by law," was controlled by the specific language which preceded it, and was not enough to save the indictment *when its sufficiency was seasonably and properly challenged.* [Italics supplied.]

This emphasized language might well be taken to mean that had the indictment not been challenged before verdict, it would have been sufficient after verdict.

We think, however, the count in question is not one involving merely a defective statement of an offense, but an entire failure to charge a crime. The problem here is essentially equivalent to that just discussed, whether the specification of the Collector of Internal Revenue was immaterial surplusage. As there we were of the opinion that the specification was material, so here we believe that the entire failure to charge a crime cannot be viewed as a minor defect susceptible of cure by verdict.

If this Court should decide that the convictions and sentences on count one ought to be reversed,

there arises the question whether the sentences of imprisonment on count two should stand. Each sentence of imprisonment on count two provides that it shall take effect "from and after expiration of term of imprisonment imposed on Count One." (R. 9, 10, 11.) If count one and the sentences thereon are eliminated, there will be no term of imprisonment on count one to expire and it will leave the date of the commencement of the sentences on count two indefinite. This is also true of the sentences of imprisonment on the remaining counts, as each is to begin to run upon the expiration of the sentence of imprisonment on the preceding count. It would seem, therefore, that the sentences of imprisonment on count two should be amended so as to make their date of commencement definite.

CONCLUSION

While we are of the opinion that the first count of the indictment does not state an offense under Federal law, that therefore the convictions and sentences on this count should be reversed, and that the sentences on the remaining counts should be amended so as to make their date of commencement definite, we do not formally confess error because we feel that where a conviction of a criminal offense has been affirmed by a Circuit Court of Appeals such judgment should not be reversed except by this Court after examination of the rec-

ord. We accordingly submit the case for decision. Cf. *Taylor* v. *United States*, 286 U. S. 1, 5.

Respectfully submitted,

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NOVEMBER, 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

Nos. 202, 203, 204.—October Term, 1937.

Harry Fleisher, Petitioner,
202 *vs.*
The United States of America.

Sam Fleisher, Petitioner,
203 *vs.*
The United States of America.

Joseph Stein, Petitioner,
204 *vs.*
The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 6, 1937.]

Per Curiam.

Judgments of conviction on four counts of an indictment charging conspiracies to violate provisions of the internal revenue laws were affirmed by the Circuit Court of Appeals. 91 F. (2d) 404. Certiorari was granted, limited to the question whether the first count of the indictment states an offense under federal law.

The first count alleged that defendants from October 1, 1934, to the date of the indictment, October 30, 1935, unlawfully conspired to possess, and caused to be possessed, stills and apparatus for the production of distilled spirits without having the same registered with the Collector of Internal Revenue as required by law. The Government concedes that under the applicable law the charge should have been that there was failure to register the stills with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue. The first count failed to state an offense. Act of March 3, 1927, c. 348, 44 Stat. 1381; 5 U. S. C. 281 c; Prohibition Reorganization Act of May 27, 1930, c. 342, 46 Stat. 427; Regulations No. 3, Bureau of Industrial Alcohol, Treasury Department (March 24, 1931), Article 14; Act of March 3, 1933, c. 212, sec. 16, 47 Stat. 1518; Executive Order No. 6639, March 10, 1934, 5 U. S. C. 132 note; Treasury Decision No. 4432, May 10, 1934.

Scott v. *United States,* 78 F. (2d) 791; *Benton* v. *United States,* 80 F. (2d) 162.

The sentence upon count two provides that it shall run "from and after expiration of term of imprisonment imposed on count one". Each of the sentences on the remaining counts runs from the expiration of the term of imprisonment imposed on the preceding count. In view of the invalidity of the sentence on count one, the sentences on the remaining counts should be amended so as to fix a definite date for their commencement.

The judgments on count one are severally reversed and the causes are remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.